Sun Cab, Inc. d/b/a Nellis Cab Company *and* Abiy Amede. Case 28–CA–079813

August 27, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON, AND MCFERRAN

On December 27, 2012, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, answering briefs, and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order, to amend his remedy,[3] and to adopt his recommended Order as modified and set forth in full below.[4]

The principal issue in this case is whether the Respondent violated Section 8(a)(1) of the Act by suspending 17 employees who engaged in a concerted work stoppage (the "extended break") to protest a proposed action that would affect their pay. As discussed below, we affirm the judge's findings that the extended break was protected under the Act and that the resulting suspensions were unlawful. In addition, we find that the Respondent coercively interrogated employees in violation of Section 8(a)(1) by asking them why they engaged in the extended break, and by asking who the leader was.[5] Furthermore, we find that the Respondent violated Section 8(a)(1) by threatening employee Abiy Amede with loss of benefits and discharge.[6] Finally, we affirm the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) when it discharged Amede.

The Suspensions of 17 Drivers for Engaging in the Extended Break

The Respondent is 1 of 16 certified taxicab companies operating in the Las Vegas metropolitan area. Its owner is Ray Chenoweth, and its director of operations is Jaime Pino. It provides 24-hour taxicab service and employs approximately 380 drivers, many of whom work 12-hour shifts. The Respondent requires its drivers to take a 1-hour lunchbreak, but drivers are free to choose when they take this break. The Respondent also requires its drivers to fill out and submit daily "trip sheets," which show, among other things, when they took the required lunchbreak. The drivers are paid on commission.

To operate in compliance with relevant State laws, Las Vegas taxicab companies must obtain a certification and medallions from the Nevada Taxicab Authority. A taxicab in operation must display a medallion. The Respondent owns 171 taxicabs and has 137 medallions.

In early 2012,[7] the Taxicab Authority began considering whether to issue more medallions. The Respondent favored this action, as did other taxicab companies, while many Las Vegas taxi drivers opposed it. Drivers were

[1] The General Counsel and the Respondent have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have amended the judge's Conclusion of Law 4 to reflect the violation found, and we have included an additional conclusion of law to reflect our finding, below, that the Respondent violated Sec. 8(a)(1) by threatening Charging Party Abiy Amede with discharge and the loss of a bonus.

[3] As explained below, the Respondent unlawfully suspended 17 employees. The judge ordered make-whole relief for the discriminatees, but inadvertently omitted from the remedy section of his decision the appropriate remedial language governing calculation of backpay. We shall amend the remedy accordingly.

[4] We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified and in accordance with our recent decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[5] Member Johnson and Member McFerran agree that, based on the totality of the circumstances, the Respondent coercively interrogated employees in violation of Sec. 8(a)(1) by asking them why they engaged in the extended break and who the leader was. The interrogations were carried out by Director of Operations Jaime Pino, who was in charge of driver discipline (and in at least one instance, in the presence of the Respondent's owner), and were accompanied by suspensions for taking part in the extended break and statements that this was their final written warning. Members Johnson and McFerran reject Member Miscimarra's contention that the Respondent needed to find out why the drivers engaged in the extended break in order to determine whether discipline would be unlawful. The Respondent makes no such argument; it argues only that the interrogations were lawful because, it says, the extended break was unprotected. Moreover, Pino testified, in effect, that he already knew what the purpose of the break was: "I knew that it was something to do with opposing allocations." He also testified that he had decided to discipline the drivers before speaking to them.

In agreement with the majority, Member Miscimarra would find that the Respondent violated Sec. 8(a)(1) by asking employees to identify the leader of the extended break. However, as set forth in his partial dissent, Member Miscimarra would reverse the judge's finding that the Respondent also violated Sec. 8(a)(1) by asking employees why they engaged in the extended break.

[6] Member Johnson and Member McFerran find that Respondent violated Sec. 8(a)(1) by threatening Abiy Amede with loss of benefits and discharge. As set forth in his partial dissent, Member Miscimarra disagrees with that view.

[7] All dates refer to 2012.

concerned that more medallions would mean more taxicabs on the streets and, in turn, less income for themselves. To express their opposition, drivers from all the Las Vegas taxicab companies organized a protest, in the form of an extended break to be taken the evening of Saturday, February 4, the day before the Super Bowl.[8]

Approximately 200 drivers took part in the extended break, including 17 working for the Respondent that evening. They gathered at a restaurant, and then many of them drove their taxicabs down Las Vegas Boulevard, honking their horns and flashing their hazard lights while refusing to pick up passengers.

The judge found that the extended break lasted "for approximately two to three hours." However, the Respondent acknowledges that for all but 2 of its 17 participating drivers, the extended break included their mandatory 1-hour lunchbreak. Subtracting the mandatory period, in most instances the extended break lasted less than 2 hours. The judge further found that the extended break was peaceful, and the Respondent did not demand that the drivers return their taxicabs to the Respondent's control during the extended break.

Following the extended break, some of the 17 drivers continued working for the remainder of their shifts. The Respondent ordered other participating drivers to refuel their taxicabs and return to the Respondent's yard, and those drivers complied. The Respondent told the 17 drivers to call in on Monday, February 6.

On or about February 6 and 7, the Respondent summoned the 17 drivers into meetings with Director of Operations Pino (and, in one case, Owner Chenoweth) and suspended them for several days for participating in the extended break. The Respondent also issued each of the 17 drivers a written warning stating that the driver had taken more than an hour for lunch, in violation of the Respondent's rules. Pino told the drivers that this was their final written warning. Some of the drivers also received written warnings for falsifying their trip sheets.[9] Pino also asked the drivers why they took the extended break and for the name of the protest leader.[10]

On February 28, the Taxicab Authority held a meeting at Cashman Field, a baseball stadium, to discuss the proposed issuance of additional medallions. Pino spoke in favor of issuing more medallions. Amede, one of the Respondent's drivers, spoke against it.

The judge found that the extended break was a protected form of protest under the Act, and that the Respondent's suspension of the 17 drivers who participated in it was therefore unlawful. We agree.

There is no dispute that the industrywide extended break constituted concerted activity. Citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the judge found that the extended break fell within the "mutual aid or protection" clause of Section 7. We agree that the extended break, the object of which was to protest a potential increase in the number of medallions that, if approved, would likely decrease drivers' pay, constituted concerted activity for the purpose of mutual aid or protection. See *Eastex*, supra at 565 (concerted activity that seeks to "improve terms and conditions of employment or otherwise improve [employees'] lot as employees" is for the purpose of mutual aid or protection); see also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14–17 (1962) (concerted walkout in protest of working conditions was protected activity).

The Respondent argues that the extended break was not protected under Section 7 because the Respondent did not have any control over whether the Taxicab Authority issued more medallions. Expressed otherwise, the Respondent contends that, because only the Taxicab Authority could remedy drivers' concerns about this matter, the extended break was nothing more than a political protest aimed at a State agency. We recognize that the Supreme Court in *Eastex* suggested, in dicta, that economic pressure in support of a political dispute may not be protected when it is exerted on an employer with no control over the outcome of the dispute. 437 U.S. at 568 fn. 18.[11] But that is not the case here. The extended break was aimed at all 16 Las Vegas taxicab companies, including the Respondent, and had as its purpose to influence them to take a position favorable to the drivers on the issuance of more medallions. Although the final decision was for the Taxicab Authority to make, the taxicab companies obviously could be expected and did seek to influence that decision (for example, at the Cashman Field meeting of the Taxicab Authority, where representatives of taxicab companies spoke in favor of issuing more medallions). The drivers, in turn, sought to influence the influencers.

Next, observing that employees have a general right to strike or engage in a work stoppage, but that such a right

[8] The judge and the parties use various terms, including "extended break," "long break," "stoppage," "work stoppage," "protest," and "strike," to describe the drivers' concerted, industrywide action. For the sake of consistency, we shall use the term "extended break."

[9] The complaint does not allege that the warnings concerning the trip sheets were unlawful. Nonetheless, the General Counsel asks us to order the Respondent to expunge those warnings from its files. Absent an allegation and finding that the warnings were unlawful, we decline to do so.

[10] We have found that Pino's questioning constituted coercive interrogation in violation of Sec. 8(a)(1). See supra, fn. 5.

[11] The Court also recognized that Congress entrusted to the Board, "in the first instance," the task of delineating the boundaries of the "mutual aid or protection" clause. Id. at 568.

is not absolute,[12] the judge asked whether the drivers' use of the taxicabs during the protest caused the extended break to be unprotected. To answer that question, the judge applied the multifactor balancing test set forth in *Quietflex Mfg. Co*., 344 NLRB 1055 (2005), for "determining which party's rights should prevail in the context of an on-site work stoppage," id. at 1056.[13] Explicitly considering each *Quietflex* factor, the judge concluded that the extended break was protected. He found that the extended break was a "one time, short duration strike" that "[fell] short of an unlawful . . . seizure" of the Respondent's property. He further found that the drivers returned the taxicabs on demand shortly after the extended break ended. The judge emphasized that the Respondent "did not demand, and the employees did not refuse[,] the return of the cabs during the stoppage."

We agree with the judge that, under *Quietflex*, the employees' conduct did not lose its Section 7 protection. A clear majority of the *Quietflex* factors support that finding. Thus, the reason the employees engaged in the extended break was to protest the plan to increase the number of taxicab medallions, which they could reasonably have believed would adversely affect their earnings. The extended break had a limited duration and was peaceful. Indeed, for most of the 17 drivers, it was shorter than the 2 to 3 hours the judge calculated. Excluding drivers' 1-hour lunchbreaks, during which *the Respondent* required drivers to remove their taxis from service, the duration of the work stoppage for 13 of the 17 drivers was less than 2 hours, and for 6 drivers, it was 1 hour or less.[14] Cf. *City Dodge Center,* 289 NLRB 194 (1988) (finding peaceful, 2- to 3-hour work stoppage protected), enfd. sub nom. *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989). Equally important is the fact that the Respondent never directed the drivers to return the taxicabs during the extended break. In this respect, the present case is similar to an on-premises work stoppage where employees were never warned they must return possession of the premises to the employer to avoid potential discipline, which, under *Quietflex*, would weigh in favor of finding that the employees did not lose the Act's protection. Also, if the drivers had returned their taxicabs, the record does not establish that substitute drivers were available. When the Respondent did order some of the drivers to return their taxis to the Respondent's facility, the drivers readily complied; thus, they did not remain in the taxis (the equivalent in this case of the Respondent's "premises") beyond their shifts. Moreover, the Respondent's failure to order the drivers to return the taxicabs during the extended break, combined with the drivers' ready compliance when the Respondent did finally order them to return their taxis, negates any suggestion that the drivers tried to "seize" the Respondent's property.[15] The drivers were not represented by a union, and the Respondent had no established grievance procedure. Finally, the reasons given for the suspensions included taking more than a 1-hour lunchbreak, but did not specifically mention interfering with the Respondent's use of its property.

Two of the *Quietflex* factors, however, weigh against protection. First, there was some interference with the Respondent's property rights, in that 17 of its taxicabs were removed from service for a period of time, despite the fact that the extended break was relatively brief and the drivers returned the taxis when they were instructed to do so. Second, although there was no established grievance procedure, the Respondent has an "open door" policy, and its handbook encourages employees to bring their problems and concerns to management, but the drivers apparently did not do so. This factor also weighs against protection, although given the nature and importance of the issue here, it would have been reasonable for the drivers to conclude that a simple appeal to the Respondent under its "open door" policy was not likely to be effective.

[12] See, e.g., *NLRB v. Washington Aluminum Co*., supra, 370 U.S. at 17.

[13] The *Quietflex* factors are (1) the reason the employees have stopped working; (2) whether the work stoppage was peaceful; (3) whether the work stoppage interfered with production, or deprived the employer access to its property; (4) whether employees had adequate opportunity to present grievances to management; (5) whether employees were given any warning that they must leave the premises or face [discipline]; (6) the duration of the work stoppage; (7) whether employees were represented or had an established grievance procedure; (8) whether employees remained on the premises beyond their shift; (9) whether the employees attempted to seize the employer's property; and (10) the reason for which the employees were ultimately [disciplined]. 344 NLRB at 1056–1057.

[14] As the Respondent concedes, it allows drivers to take two 15-minute breaks during their shifts in addition to the 1-hour lunchbreak. If these breaks are included in the calculation, the duration of the stoppage obviously would be further reduced.

[15] Member Johnson views this evidence as key to his agreement that the protesting drivers did not lose the Act's protection. Whether or not the Respondent had substitute drivers available, it is undisputed that they could not have driven cabs without the medallions in the possession of the protesting drivers. In his view, a finding that those drivers seized the Respondent's means of production would require holding their conduct to be unprotected, regardless of what number of other *Quietflex* factors weighed in favor of protection. See, e.g., *Yale University*, 330 NLRB 246, 248 (1999) (faculty grade strike was unprotected because it involved the withholding of papers and test materials that the school needed to attempt continued operations), and *NLRB v. Fansteel Metallurgical Corp.,* 306 U.S. 240, 256–257 (1939) (illegal seizure of buildings to prevent employer's use of them unprotected).

For all the foregoing reasons, we find that the great majority of the *Quietflex* factors weigh in favor of finding the extended break to be protected, and the only two that weigh against protection do not change the balance.[16] In these circumstances, we find that the intrusion on the Respondent's property rights was slight, and insufficient to render the extended break unprotected.[17] And because the extended break was protected under the Act, the Respondent violated Section 8(a)(1) by suspending the 17 participants.[18]

Threats of Loss of Benefits and Discharge

During the same meeting at which Director of Operations Pino unlawfully interrogated and suspended driver Amede and issued him a "final written warning," Owner Chenoweth asked Amede how long Amede had worked for the Respondent, whether he liked working for the Respondent, whether he had received a Christmas bonus, and whether he liked the bonus. The complaint alleged that by these questions, the Respondent, through Chenoweth, violated Section 8(a)(1) of the Act by threatening Amede with loss of benefits, including the Christmas bonus, and with discharge. We find these violations as alleged.

The judge recounted the pertinent facts,[19] but neglected to rule on the allegation. The General Counsel excepts to this omission, arguing that Chenoweth's questions created the impression that Amede must cease his protected concerted activities if he wished to remain employed by the Respondent. In opposition, the Respondent argues that the alleged threats were nothing more than "innocuous" comments that did "not rise to the level of a threat."[20]

We disagree with the Respondent's characterization of Chenoweth's questions as innocuous. Chenoweth—the owner of the company—pointedly asked Amede not only how long he had worked for the Respondent and whether he had received a Christmas bonus, but whether he *liked* working for the Respondent and *liked* the bonus. In the same meeting, Amede was suspended and told that this was his final warning, underscoring the vulnerable status of his employment with the Respondent. Pino's unlawful interrogation of Amede—asking him why he participated in the extended break, and for the identity of its leader—exacerbated the threatening atmosphere. Under these circumstances, and viewing Chenoweth's questioning from the employee's perspective, as we must,[21] we find that Amede would reasonably understand the questions to imply threats of loss of benefits and discharge. See, e.g., *Black Angus of Lauderhill, Inc*., 213 NLRB 425, 427 (1974) (finding unlawful, as an implied threat, an employer's questioning a union supporter about how long he had worked for the employer and whether he liked working for the employer).

Discharge of Amede

Following the unlawful suspensions in early February, some of the Respondent's drivers met with organizers from the Industrial, Technical and Professional Employees Union, Local 4873, affiliated with Office and Professional Employees International Union, AFL–CIO (the Union). Around February 16, the Union notified the Respondent by letter that it was conducting an organizing campaign. The letter listed members of the organizing committee, including Amede. In addition to serving on the committee, Amede signed a union authorization card and solicited cards from employees. Around April 18, on his day off, he went to McCarran Airport in Las Vegas to pass out union information to the Respondent's drivers.[22]

[16] In so finding, however, we do not rely on the judge's statement that the Respondent could refuse any additional medallions.

[17] The Respondent also argues that the work stoppage was unprotected because it caused the Respondent to suffer significant financial losses. We reject this claim because the statutory scheme includes the right of employees to resort to protected economic weapons. See *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 233–234 (1963) (noting that approval of the use of economic weapons underlies the Act's "repeated solicitude for the right to strike").

[18] The Respondent excepts to the requirement that it post a notice regarding this violation and expunge any reference to the suspensions from its files. It argues that these remedies are inappropriate here because employees might misinterpret them as legitimizing participation in similar work stoppages in the future that, according to the Respondent, would not be protected. To prevent any such misinterpretation, we reiterate that we require the Respondent to cease and desist from engaging in conduct that violates its employees' right to engage in *protected* concerted activities, and to remove from its files references to the *unlawful* suspensions of the 17 employees who participated in the extended break. These remedies cannot reasonably be interpreted to grant employees carte blanche to engage in *unprotected* work stoppages in the future. We emphasize that the Respondent remains free to discipline or discharge employees for doing so.

[19] The judge did not mention that Chenoweth, in addition to asking Amede whether he had received a Christmas bonus, asked him whether he liked the bonus. The record shows that Chenoweth asked both questions. Contrary to our dissenting colleague, we believe that the judge's factual recitation relating to these allegations and the record provide a sufficient basis for us to rule on these allegations. We note that the Respondent does not dispute that Chenoweth asked these questions. Instead, its argument is limited to its assertion, which we reject, that the questions were innocuous.

[20] The Respondent also asserts that the statements were not unlawful because they concerned a driver's unprotected conduct. Because we have found that the drivers were engaged in protected conduct, this contention is without merit.

[21] See, e.g., *Atlas Logistics Group Retail Services (Phoenix)*, 357 NLRB No. 37, slip op. at 1 fn. 2 (2011).

[22] The judge did not specifically find that the Respondent was aware of Amede's union activities. The judge only noted that the activities were "open."

At the beginning of 2012, the Respondent, facing high insurance costs, had adopted a new policy of discharging drivers involved in frequent traffic accidents. Two days after he passed out union literature at the airport, Amede was involved in a traffic accident. The record reflects that this was the eighth accident that Amede was involved in during the approximately 3 years that he worked for the Respondent. Amede's supervisor told him to go home and call in on Monday. When Amede called in, the Respondent told him that he was discharged. The Respondent's written reason for the discharge was "too many at fault accidents." It was subsequently determined that Amede had not been at fault in this accident. Between January 1 and July 31, the Respondent discharged 26 drivers for involvement in traffic accidents.

The judge found that the Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging Amede.[23] He found that the General Counsel established a "strong" initial case under *Wright Line*,[24] based on Amede's open support of the Union, including his membership on the organizing committee and his distribution of union information to the Respondent's drivers at the airport. However, he also found that the Respondent established that it would have discharged Amede even in the absence of his union activities because its decision to do so was consistent with its discharge of other employees involved in accidents in 2012.

The General Counsel excepts to the judge's finding that the Respondent sustained its *Wright Line* defense burden. He asserts that the Respondent treated Amede more harshly, due to his union activities, than certain other drivers who were involved in accidents. The Respondent, for its part, asserts that the judge correctly dismissed the allegation, but argues that he should have done so on the ground that the General Counsel failed to meet his initial burden under *Wright Line*.

We agree with the Respondent. As the judge found, Amede engaged in union activity, and the Respondent was aware of that activity, having been informed by the Union that Amede was a member of the organizing committee. However, the judge did not identify, and the record does not contain, any evidence of antiunion animus. Indeed, the General Counsel concedes that the Respondent did not say or do anything directly indicative of such animus. He contends, however, that animus may be inferred from the timing of Amede's discharge and the Respondent's alleged disparate treatment of him. We are unpersuaded. Although Amede was discharged soon after distributing union leaflets at the airport, there is no evidence that the Respondent knew that Amede had distributed the leaflets, and no other evidence linking the discharge to his union activity rather than to the accident 2 days later.

The General Counsel's disparate treatment argument is likewise not supported by the record. As stated, in an effort to avoid incurring higher insurance costs, the Respondent began firing drivers who had been involved in frequent traffic accidents. In all, it discharged 26 drivers, including Amede, between January and July 2012. Of those, 14, including Amede, had more than 6 accidents; of the 46 drivers who had accidents but were not terminated, none had more than 6 accidents. The General Counsel has failed to identify any driver who had more accidents than Amede but was not discharged. Thus, the record supports the judge's finding that Amede's discharge was consistent with the Respondent's discharge of other drivers involved in accidents.

Because the General Counsel failed to establish that Amede's discharge was unlawfully motivated, he did not sustain his initial *Wright Line* burden. We therefore dismiss this allegation.[25]

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully suspended 17 employees, we shall order the Respondent to rescind the suspensions and make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. Backpay for the discriminatees shall be computed as prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons,* 283

[23] The complaint alleged that Amede was discharged because of his union activities, not because of his role in the protected concerted extended break.

[24] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that an employee's union activity was a motivating factor in the employer's adverse action. If the General Counsel sustains that burden, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the employee's union activity. Id. at 1089.

[25] Accordingly, we do not reach the issue of whether the Respondent met its defense burden under *Wright Line* of showing that it would have discharged Amede even in the absence of his union activity. Member Miscimarra joins his colleagues in finding that the General Counsel failed to meet his initial burden under *Wright Line*. Member Miscimarra would also find, however, in agreement with the judge, that the Respondent demonstrated it would have discharged Amede even in the absence of his union activity.

NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also be required to remove from its files any and all references to the unlawful discipline imposed on these employees, and to notify them in writing that this has been done and that the discipline will not be used against them in any way.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 4.

"4. By coercively interrogating employees about their own and other employees' protected concerted activities, the Respondent violated Section 8(a)(1) of the Act."

2. Insert the following as Conclusion of Law 5 and renumber the subsequent paragraphs accordingly:

"5. By threatening an employee with discharge and the loss of a bonus, the Respondent violated Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, Sun Cab, Inc. d/b/a Nellis Cab Company, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their protected concerted activities or the protected concerted activities of other employees.

(b) Suspending employees for engaging in protected concerted activities.

(c) Threatening employees with discharge or the loss of a bonus if they engage in protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Dawit Alemu, Abiy Amede, Tadesse A. Asheber, Abinate Bekele, Getachew A. Beyene, Daniel Biru, Abraham Dirar, Kifelemarko Gebreyesus, Getachew B. Haileselassie, Akmel Hasen, Ermias Mehanzel, Senait Terefe, Abraham H. Terffa, Hailemariam G. Wolde, Getadegu Woldemariam, Yonas H. Yadessa, and Leuseged W. Yezengaw whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(b) Compensate Dawit Alemu, Abiy Amede, Tadesse A. Asheber, Abinate Bekele, Getachew A. Beyene, Daniel Biru, Abraham Dirar, Kifelemarko Gebreyesus, Getachew B. Haileselassie, Akmel Hasen, Ermias Mehanzel, Senait Terefe, Abraham H. Terffa, Hailemariam G. Wolde, Getadegu Woldemariam, Yonas H. Yadessa, and Leuseged W. Yezengaw for any adverse income tax consequences of receiving their backpay in one lump sum, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions of Dawit Alemu, Abiy Amede, Tadesse A. Asheber, Abinate Bekele, Getachew A. Beyene, Daniel Biru, Abraham Dirar, Kifelemarko Gebreyesus, Getachew B. Haileselassie, Akmel Hasen, Ermias Mehanzel, Senait Terefe, Abraham H. Terffa, Hailemariam G. Wolde, Getadegu Woldemariam, Yonas H. Yadessa, and Leuseged W. Yezengaw, and within 3 days thereafter notify each of them in writing that this has been done and that the suspensions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current em-

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ployees and former employees employed by the Respondent at any time since February 6, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 27, 2015

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

For reasons stated in the Board's opinion, I agree that the Respondent's drivers engaged in a protected work stoppage and their suspensions violated Section 8(a)(1). I also agree that the Respondent violated Section 8(a)(1) by interrogating the drivers about the identity of their leader, and that the judge properly dismissed the allegation that Abiy Amede's discharge violated Section 8(a)(3). However, I dissent in two respects.

First, I disagree with the majority's finding that the Respondent violated Section 8(a)(1) by asking employees why they failed to perform their work on the evening of February 4, 2012, as scheduled. In my view, such an inquiry is clearly permissible under the Act when employees fail to do work they have been directed to perform. Indeed, the analysis utilized by the majority and the judge in this case demonstrates that the Respondent could not even determine *whether* drivers engaged in a "protected" work stoppage—which would render discipline unlawful—unless the Respondent asked why the drivers failed to perform the assigned work as scheduled. For example, if five drivers failed to work because of reasons unrelated to the medallion dispute (for example, if they had personal obligations or other reasons unique to them that prevented them from working), these particular failures to work would not be protected under the Act, and discipline based on such failures to work would be lawful under Section 8(a)(1). In my view, therefore, an employer faced with a cessation of work always has the right to ask employees why they failed to perform scheduled or assigned work, and such an inquiry cannot reasonably be deemed violative of the Act. Other decisions of the Board and the courts establish that employees faced with such a question may have other types of protection—for example, employees have a potential right to request the assistance of a *Weingarten* representative in a unionized work setting. See, e.g., *NLRB v. J. Weingarten,* 420 U.S. 251 (1975). Employees are protected against more intrusive inquiries that constitute coercive interrogation. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Employees are also protected against subsequent adverse actions by the employer based on the employee's participation in protected concerted activities. E.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). These protections reinforce the right of an employer, in the first instance, to undertake a reasonable investigation whenever employees fail to perform scheduled work in the manner directed or assigned, which necessarily includes asking the question, "why?"

Second, I disagree with my colleagues that the Respondent violated Section 8(a)(1) by threatening Amede with loss of benefits and discharge. In my view, there is an insufficient evidentiary basis for the Board to rule on these threat allegations. The judge did not rule on them, and he made no credibility resolutions relating to the allegations. Additionally, the judge did not even mention one of the questions relied upon by the majority—i.e., whether Amede liked his Christmas bonus—and this question, to the extent it was asked, is central to the majority's finding that the Respondent threatened loss of benefits. Moreover, even assuming that Amede was asked whether he received a Christmas bonus, whether he liked the bonus, and whether he liked working for the Respondent, I believe that such questions do not rise to the level of threats that violate Section 8(a)(1) of the Act.

Dated, Washington, D.C. August 27, 2015

Philip A. Miscimarra, Member

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your protected concerted activities or the protected concerted activities of other employees.

WE WILL NOT suspend you for engaging in protected concerted activities.

WE WILL NOT threaten you with discharge or the loss of a bonus if you engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make Dawit Alemu, Abiy Amede, Tadesse A. Asheber, Abinate Bekele, Getachew A. Beyene, Daniel Biru, Abraham Dirar, Kifelemarko Gebreyesus, Getachew B. Haileselassie, Akmel Hasen, Ermias Mehanzel, Senait Terefe, Abraham H. Terffa, Hailemariam G. Wolde, Getadegu Woldemariam, Yonas H. Yadessa, and Leuseged W. Yezengaw whole for any loss of earnings and other benefits resulting from their suspensions, plus interest.

WE WILL compensate Dawit Alemu, Abiy Amede, Tadesse A. Asheber, Abinate Bekele, Getachew A. Beyene, Daniel Biru, Abraham Dirar, Kifelemarko Gebreyesus, Getachew B. Haileselassie, Akmel Hasen, Ermias Mehanzel, Senait Terefe, Abraham H. Terffa, Hailemariam G. Wolde, Getadegu Woldemariam, Yonas H. Yadessa, and Leuseged W. Yezengaw for any adverse income tax consequences of receiving their backpay in one lump sum, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions of Dawit Alemu, Abiy Amede, Tadesse A. Asheber, Abinate Bekele, Getachew A. Beyene, Daniel Biru, Abraham Dirar, Kifelemarko Gebreyesus, Getachew B. Haileselassie, Akmel Hasen, Ermias Mehanzel, Senait Terefe, Abraham H. Terffa, Hailemariam G. Wolde, Getadegu Woldemariam, Yonas H. Yadessa, and Leuseged W. Yezengaw, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and the suspensions will not be used against them in any way.

SUN CAB, INC. D/B/A NELLIS CAB COMPANY

The Board's decision can be found at www.nlrb.gov/case/28-CA-079813 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Larry A. (Tony) Smith, Esq., for the Acting General Counsel.
James T. Winkler, Esq. (Littler Mendelson, P.C.,), of Las Vegas, Nevada, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Las Vegas, Nevada, on September 25–26, 2012. On April 27, 2012, Abiy Amede filed the charge in Case 28–CA–079812 alleging that Sun Cab, Inc., d/b/a Nellis Cab Company (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). Amede filed the first amended charge on June 27, 2012. On June 29, 2012, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(3) and (1) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my

observation of the demeanor of the witnesses[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Las Vegas, Nevada, has been engaged in the operation of taxicab services in Las Vegas, Nevada. During the 12 months prior to the filing of the charge, Respondent purchased and received goods valued in excess of $50,000 directly from outside the State of Nevada. During the same time period, Respondent received gross revenues in excess of $500,000. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Respondent is engaged in the business of providing taxicab services in the Las Vegas metropolitan area. It is 1 of 16 cab companies certified to operate in Las Vegas by the Taxi Authority. Respondent has 137 medallions which permit it to operate some of the approximately 171 cabs which it owns. There are different categories of medallions, some of which allow unrestricted use and some which have geographic or time restrictions.

When a driver gets a cab, he or she receives a trip sheet from the supervisor that has basic information about the cab and the driver. The drivers must provide information on the trip sheet, including the start time and stop time of their shift, the pickup time and location for their rides, the dropoff location for their rides, the fare for each ride, the mandatory 1-hour lunchbreak, and miscellaneous information for total mileage, fees, and fares. Drivers are not paid an hourly wage, and are only paid a commission which is based on one half of their "net book."

In early 2012, in response to the Taxi Authority considering awarding more medallions to the Las Vegas taxi companies, taxi drivers from across 16 different Las Vegas cab companies organized a concerted effort to protest the additional medallions and the resulting increase in the number of operating taxicabs. The drivers were concerned that an increase in the number of taxicabs would result in fewer fares and thus, less income for the drivers. The employees decided to hold an industrywide extended break to take place on Saturday, February 4, the day before Super Bowl Sunday. This extended break was participated in by employees of all the Las Vegas cab companies. Several of Respondent's drivers started their breaks by driving to an Ethiopian restaurant where they found drivers from all of the Las Vegas cab companies. Over a short period of time, approximately 200 cabs from the 16 cab companies gathered at the restaurant. Many of the drivers drove their cabs down Las Vegas Boulevard while refusing to pick up passengers. After driving down the Boulevard honking their horns and flashing their lights, the drivers returned their cabs to service. The extended break lasted for approximately 2 to 3 hours.

Some of Respondent's drivers continued picking up customers and collecting fares for the remainder of their shifts, some drivers were ordered to gas their cabs and return to Respondent's yard. Respondent suspended 17 drivers for participating in the extended break. Each of the 17 suspended drivers was given a warning which stated that they had taken more than the 1-hour lunchbreak in violation of Respondent's rules.[2] Some of the drivers were also given warnings for falsifying their trip sheets.

Respondent amended its employee handbook to add disciplinary action for "any partial strike, sit down strike or work slowdown that is unprotected by the National Labor Relations Act or any other federal law, is against company policy, is prohibited and will subject the employee to discipline up to and including termination" and required all the drivers to sign for receipt of the amendment.

When the drivers were suspended for their participation in the extended break, they were called into the office of Jaime Pino, Respondent's director of operations. During these meetings the drivers were told that this was their final written warning. Pino asked why they took the long break and also asked the identity of the leader.

Employee Abiy Amede spoke against the issuance of more medallions at a taxi authority meeting attended by Jaime Pino. When Amede was suspended, he was called into Pino's office. Ray Chenoweth, Respondent's owner was present. Chenoweth asked how long Amede had worked for Respondent and whether he liked working for Respondent. Chenoweth also asked whether Amede had received a Christmas bonus. Following the suspensions for the February 4 extended break, Respondent's drivers met with the Union. On or about February 16, 2012, the Union sent an organizing letter to Respondent informing it that an organizing campaign was underway and specifically named committee members including Abiy Amede.

Amede signed a union authorization card and solicited cards from other drivers. On or about April 18, Amede went to McCarran Airport in Las Vegas to pass out union information to Respondent's drivers on his day off.

On April 20, Amede was involved in an automobile accident. The damage to his cab was minor. Amede was told to go home by his supervisor and to call in on Monday. When Amede called in, he was told that he was terminated. The written reason for Amede's termination was "too many at fault accidents."

[1] The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

[2] The 17 drivers were Dait Alemu, Abiy Amede, Tadesse A. Asheber, Abinate Bekele, Getachew A. Beyene, Daniel Biru, Abraham Dirar, Kifelemarko Gebreyesus, Getachew B. Haileselassie, Akmel Hasen, Ermias Mehanzel, Senait Terefe, Abraham H. Terffa, Hailemariam G. Wolde, Getadegu Woldemarian, Yonas H. Yadessa, and Leusege W. Yezengaw.

After Amede's termination it was determined that he was not at fault.

Respondent presented evidence that in November 2011, it was faced with increased auto insurance costs. Respondent adopted an on-line driver safety course to be taken by drivers with frequent accidents. Beginning in 2012, Respondent adopted a new approach to the termination of drivers who had accidents. Drivers would be terminated based on the frequency of accidents. Between January 1 and July 31, 2012, Respondent terminated 26 drivers for driving accidents. Amede had eight accidents when he was terminated. Pino testified that at the time Amede was terminated he had eight accidents and that his production had fallen off dramatically for 2 months. Amede's production in February 2012 was 51 percent below the average of those in his shift and was 56 percent below the average in March.

B. Conclusions

1. The strike

The General Counsel contends that the extended break taken by Respondent's taxi drivers was a protected strike. Respondent contends that the strike was an unprotected sitdown strike. Employees can engaged in a protected strike without representation by a union. *NLRB v. Washington Aluminum Co.,* 370 U.S. 9 (1962). The Act protects the right of employee to engage in concerted activities including the right to strike without prior notice. *Bethany Medical Center,* 328 NLRB 1094 (1999). However, there is no absolute right to strike as activity is not protected which is "unlawful, violent, in breach of contract, or otherwise indefensible." *Bethany Medical Center,* supra (citing *NLRB v. Washington Aluminum Co.,* 370 U.S. at 17. Such unprotected conduct includes the unlawful seizure and retention of an employer's property. *NLRB v. Fansteel Metallurgical Corp.,*306 U.S. 240, 248–257 (1939) (finding a strike was an illegal seizure of the employer's buildings and were acts of force and violence to compel the employer to submit the employees refused police orders and court injunction to leave, and resisted the sheriff which resulted in their arrest).

Respondent argues that the strike was "an organized, calculated strike involving employees of several companies, designed to financially harm the companies and to deprive the public of service, in an effort not to address grievances to their employers, but to lobby a governmental agency." In *Quietflex Mfg. Co.,* 344 NLRB 1055, 1056 (2005) the Board listed 10 factors "that the Board has considered in determining which party's rights should prevail in the context of an onsite work stoppage." The reason the employees stopped working:

(1) Whether the work stoppage was peaceful;
(2) Whether the work stoppage interfered with production or deprived the employer access to its property;
(3) Whether employees had adequate opportunity to present grievances to management;
(4) Whether employees were given any warning that they must leave the premises or face discharge;
(5) The duration of the work stoppage
(6) Whether employees were represented or had an established grievance procedure
(7) Whether employees remained on the premises beyond their shift
(8) Whether the employees attempted to seize the employer's property; and
(9) The reason for which the employees were ultimately discharged.

First, the General Counsel admits the employees stopped working to protest the number of taxicabs permitted by the Nevada Taxicab Authority. Respondent did not have the ability to remedy this concern. Respondent could refuse any additional medallions. Second, Respondent admits that the work stoppage was peaceful. Third, the work stoppage interfered with Respondent's production, i.e., its ability to serve the public. Respondent was unable to assign the taxicabs to other drivers. Fourth, the employees' grievances were directed at the taxicab authority and not really at Respondent's management. Fifth, the employees were not discharged but were suspended for a number of days. Sixth, the work stoppage lasted between 2 and 3 hours. Seventh, the employees were not represented and had no established grievance procedure. Eighth, the employees did not remain on the premises or in their cabs after their shift. However, the employees did occupy their cabs beyond a normal lunchbreak. Ninth, the employees utilized Respondent's taxicabs during the strike, preventing Respondent from using other drivers. Tenth, the employees were not discharged. Respondent admits they were suspended for engaging in the strike, which it contends was unprotected.

The General Counsel cites *Eastex, Inc. v. NLRB,* 437 U.S. 556, 558–566 (1978), for the proposition that the mutual aid or protection clause of Section 7 of the Act "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums and that employees' appeals to legislators to protect their interests are within the scope of this clause. In *Eastex,* the employer was found to have violated Section 8(a)(1) when it prohibited its employees from distributing flyers regarding a right-to-work statue, and a Presidential veto of an increase in the Federal minimum wage. In *Eastex* the Supreme Court specifically rejected the employer's argument that the mutual aid or protection clause of Section 7 protects only concerted activity by employees that is directed at conditions that their employer has the authority or power to change or control and rejected the argument that the term employees in Section 7 refers only to employees of a particular employer, so that only activity by employees on behalf of themselves or other employees of the same employer is protected.

The General Counsel argues that the drivers' use of the taxicabs falls far short of an unlawful trespass and seizure. Second, the General Counsel argues that there were no drivers to drive the cabs even if the drivers returned the cabs. Respondent disputes this fact. Third, the drivers put the cabs back into service as soon as they were done, as opposed to seizing the property for an extended period of time. Fourth, the drivers did not ignore any police or court orders to return the cabs to service. Fifth, the General Counsel argues that the drivers were not required to insure that Respondent's customers could find alternate service elsewhere. Finally, the General Counsel argues that the strike

was analogous to a refusal to provide service in a factory arguing that an out of service taxicab is analogous to an unused machine.

Under *Eastex* the protest against the Taxicab Authority was protected. The issue is whether the utilization of the taxicabs during the protest caused the strike to be unprotected. As noted, the strike lasted between 2 and 3 hours. Respondent contends that it could have called other drivers. The General Counsel disputes that claim. I find that this one time, short duration strike, did not lose protection of the Act by use of the taxicabs during the protest. The strike was for a short duration. The taxicabs were returned shortly thereafter. I agree with the General Counsel that this action falls short of an unlawful trespass or seizure. Respondent did not demand, and the employees did not refuse the return of the cabs during the stoppage. Thus, I find the protest did not lose protection of the Act.

Allegations of Interrogation

Following the February 4 strike, some of Respondent's 17 drivers were called to the office of Jaime Pino to be disciplined. During the meetings, Pino told the drivers that this was their final written warning, and asked drivers why they took the long break and also asked the identity of the leader.

The Board's test for determining whether interrogation of employees concerning their union activities or the union activities of other employees is set out in *Rossmore House*, 269 NLRB 1176, 1177 (1984):

> Whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.

The Board has said that a totality of the circumstances test must be applied, even when the interrogation is directed to unit members whose union sympathies are unknown to the employer. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Some of the considerations taken into account by the Board in determining whether, under the totality of the circumstances, the interrogation was coercive include: Whether the employee interrogated was an open and active union supporter; whether there is a history of employer hostility towards or discrimination against union supporters; whether the questions were general and nonthreatening; and whether the management official doing the questioning had a casual and friendly relationship with employee being questioned. *Sunnyvale Medical Clinic*, supra at 1218.

I find that this interrogation of the employees, violated Section 8(a)(1) of the Act. Here the employees had engaged in a protected strike and the questions pertaining to the strike and its leader tended to restrain and coerce employees in violation of Section 8(a)(1). I find by this conduct, in the context of unlawful suspensions, Respondent violated Section 8(a)(1) of the Act.

2. The discharge of Abiy Amede

In cases involving dual motivation, the Board employs the test set forth in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that the General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line,* supra*,* 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services,* 343 NLRB 1183 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services,* supra at 1184:

> To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts,* 340 NLRB No. 94, slip op. at 3 [846, 848] (2003).

When the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries,* 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line,* supra*,* 251 NLRB at 1088 fn. 11.

First, Amede was engaged in union activity and Respondent was aware of that activity. Amede was listed as a member of the Union's organizing committee and his support of the Union was open. On April 18, Amede went to McCarran Airport in Las Vegas to pass out union information to Respondent's drivers. Under these circumstances, I find that the General Counsel has established a prima facie case that Amede was discharged, because of his union activities.

Thus, the burden shifts to Respondent to establish that the same action would have taken place in the absence of the employee's union activities. Where, as here, the General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.*, 271 NLRB 443 (1984).

As stated above, Respondent was faced with rising insurance costs. As a result, Respondent began terminating employees for

frequent accidents. On April 20, Amede was involved in an accident which was initially found to be his fault. Based on his history of accidents, Amede was discharged. His discharge was consistent with Respondent's discharge of other employees involved in accidents in 2012.

Thus, I find that Respondent has established that Amede would have been discharged even in the absence of his union activities. Accordingly, I find that Respondent did not violate Section 8(a)(3) and (1) by discharging Amede.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By suspending 17 employees for their participation in a lawful work stoppage, Respondent violated Section 8(a)(1) of the Act.
4. By coercively interrogating employees about their union activities and union sympathies, Respondent violated Section 8(a)(1) of the Act.
5. The above-unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent did not otherwise violate the Act as alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily suspended the 17 employees discharged it must make them whole for any loss of earnings Respondent must also be required to remove any and all references to its unlawful suspensions, from its files and notify the employees in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against them in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended[3]

ORDER

Respondent, Sun Cab, Inc. d/b/a Nellis Cab Company, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their protected concerted activities.

(b) Suspending employees for engaging in a lawful work stoppage.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the following 17 drivers: Dait Alemu, Abiy Amede, Tadesse A. Asheber, Abinate Bekele, Getachew A. Beyene, Daniel Biru, Abraham Dirar, Kifelemarko Gebreyesus, Getachew B. Haileselassie, Akmel Hasen, Ermias Mehanzel, Senait Terefe, Abraham H. Terffa, Hailemariam G. Wolde, Getadegu Woldemarian, Yonas H. Yadessa and Leusege W. Yezengaw for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions of the 17 drivers, and within 3 days thereafter notify them in writing that this has been done and that the discipline will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2012.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 27, 2012

[3] All motions inconsistent with this recommended order are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your protected concerted activities or the activities of your fellow employees.

WE WILL NOT suspend employees or discipline employees for engaging in a protected work stoppage.

WE WILL NOT In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole drivers Dait Alemu, Abiy Amede, Tadesse A. Asheber, Abinate Bekele, Getachew A. Beyene, Daniel Biru, Abraham Dirar, Kifelemarko Gebreyesus, Getachew B. Haileselassie, Akmel Hasen, Ermias Mehanzel, Senait Terefe, Abraham H. Terffa, Hailemariam G. Wolde, Getadegu Woldemarian, Yonas H. Yadessa, and Leusege W. Yezengaw for any loss of earnings suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any reference to the unlawful suspensions of the 17 drivers, and WE WILL NOT make reference to the permanently removed materials in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, and we will not use the permanently removed material against these employees.

SUN CAB, INC. D/B/A NELLIS CAB COMPANY